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December 3, 2004

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, Massachusetts 02110

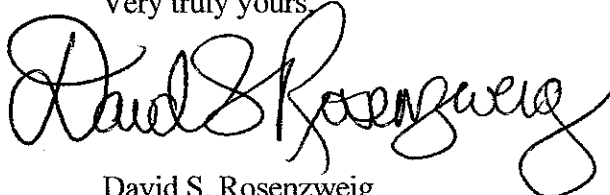
Re: Notice of Inquiry, D.T.E. 04-92

Dear Ms. Cottrell:

Please find enclosed an original and ten (10) copies of the comments of NSTAR Electric in the above-referenced case.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "David S. Rosenzweig". The signature is fluid and cursive, with the first name "David" and last name "Rosenzweig" clearly distinguishable.

David S. Rosenzweig

cc: M. Kathryn Sedor, Hearing Officer
Mary Grover, Esq.

Investigation Regarding the Circumstances
Under Which an Electric Company Must Seek
Approval Pursuant to G.L. c. 164, § 72 Prior to
Transmission Line Construction or Alteration

I. INTRODUCTION

II. THE DEPARTMENT'S REQUEST FOR COMMENTS

Any electric company, distribution company, generation company, or transmission company or any other entity providing or seeking to provide transmission service may petition the [D]epartment for authority to construct and use or to continue to use as constructed or with altered

construction a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for the purpose of operating it, and shall represent that such line will or does service to public convenience and is consistent with the public interest The [Department, after notice and a public hearing in one or more of the towns affected, may determine that said line is necessary for the purpose alleged, and will service the public convenience and is consistent with the public interest. If the electric company, distribution company, generation company or transmission company or any other entity providing or seeking to provide transmission service shall file with the [D]epartment a map or plan of the transmission line showing the towns through which it will or does pass, the public ways, railroads, railways, navigable streams and tide waters in the town named in said petition which it will cross, and the extent to which it will be located upon private land or upon, under or along public ways and places, the [D]epartment ... may by order authorize and electric company, distribution company, generation company, or transmission company or any other entity to take by eminent domain under chapter 79 such lands, or such rights of way or widenings thereof, or other easements therein necessary for the construction and use or continued use as constructed or with altered construction of such line along the route prescribed in the order of the [D]epartment.

G.L. c. 164, § 72. To assist its interpretation and application of this statutory language, the Department issued questions on three separate areas of statutory interpretation with regard to Section 72. The first set of questions seeks to define the nature of the transmission lines that are subject to Section 72. The second series of questions seeks to determine what the Department should consider “altered construction,” thereby requiring approval under Section 72. The last set of questions seeks to define the scope of Section 72 proceedings before the Department. Each of these issues is analyzed by the Company in detail below.

Before addressing these issues, it is important to recognize the context in which the Legislature originally enacted Section 72 (St. 1914, c. 742, § 128), as well as the subsequent development of the electric utility industry over the past century. Back in the early 1900s, electric companies were at the earliest stages of their inception, and were

beginning to expand their systems to serve a widening customer base by placing wires, poles, conduits in public ways and on private rights of way (“ROWS”) throughout the Commonwealth. See Weld v. Gas & Elec. Illuminating Co. of Boston, 197 Mass. 556, 557-59 (1908); Attorney Gen. v. Haverhill Gaslight Co., 215 Mass 394, 397-99 (1913).¹ Because of the available economies of scale and scope, electric companies were formed as vertically integrated monopolies, providing the full range of generation, transmission and distribution services for the benefit of customers on essentially an exclusive basis.

During this same time frame, the powers of the Department (originally called the “Gas and Electric Light Commissioners”) were established by the Legislature to ensure comprehensive oversight of electric companies, their financial operations, their rates for retail service to customers and their facilities. See generally G.L. c. 164, §§ 1 et seq.; St. 1914, c. 742. Chapter 164, as enacted by the Legislature, reflects the public-policy interest to enable utilities the opportunity to provide safe, reliable and economic electric service to all customers desiring electricity, subject to the broad and consistently applied authority of the Department. More specifically, in combination with Chapter 166, Chapter 164 established rigorous protections to ensure the preeminent rights of electric companies to place their facilities in public ways, to obtain the rights needed for such locations and to acknowledge the franchise rights of such electric companies.² G.L. c. 164, §§ 21, 30, 86-91; G.L. c. 166, §§ 21-28.

¹ Before the 1900s, electric service in Massachusetts was less ubiquitous, with isolated customers and service providers concentrated on the largest users of electricity. Id.; see also Boston Real Estate Bd. v. Department of Pub. Utils., 334 Mass. 477 (1956).

² These franchise rights were affirmed and made explicit by the Electric Restructuring Act of 1997 (the “Restructuring Act” (G.L. c. 164, § 1B(a)). See Franklin W. Olin College of Engineering v. Department of Telecomm. and Energy, 439 Mass. 857, 860 (2003).

At this time, among other agencies that have since been created to review the need for, cost and environmental impact of energy facilities, there was no Energy Facilities Siting Board (the "Siting Board") (G.L. c. 164, §§ 69G-S); there was no Massachusetts Environmental Policies Act ("MEPA") (G.L. c. 30, §§ 62 et seq.); and there was no Department of Environmental Protection or Executive Office of Environmental Affairs (G.L. c. 21A, §§ 1 et seq.). Moreover, the conflicting interests of affected cities and towns and the inconsistent application of those interests could frustrate the broader public interest throughout Massachusetts if an entity such as the Department did not exist that had clear jurisdiction to oversee the public necessity and convenience for energy facilities in these circumstances. See Boston Edison Co. v. Town of Sudbury, 356 Mass. 406 (1969); Town of Sudbury v. Department of Pub. Utils., 351 Mass. 214 (1966); Town of Sudbury v. Department of Pub. Utils., 343 Mass. 428 (1962). Thus, within the broader public-policy context of Chapter 164, Section 72 was established to safeguard the development of the electric utility industry, to ensure that all necessary transmission lines³ would be located and to facilitate grants of eminent domain where needed, all subject to the stewardship of the Department.

Over the past century, many aspects of this historical development of the industry have changed, while other aspects have not. Although electric utilities still have exclusive franchise rights for distribution service to retail customers, electric companies are no longer vertically integrated, and distribution companies no longer own or operate

³ On the other hand, because of the smaller size of distribution lines and their more common use of public ways, municipalities were granted the first-level authority to site such facilities; however, even here, the Department was placed in a preemptive role to resolve disputes between cities and towns and those entities seeking to place wires and conduits in public ways for the provision of electricity. G.L. c. 166, §§ 21, 27 and 28.

generating facilities supplying electricity to retail customers. However, under both the federal and state regulatory regimes, transmission companies and distribution companies must still build needed transmission and distribution facilities to serve both their retail and wholesale customers on a non-discriminatory basis. The regulatory framework for environmental permitting of new energy facilities has expanded dramatically, now including not only the Siting Board, MEPA and DEP, but myriad other state and local agencies and boards from which approval must be obtained in order to construct transmission lines and other energy facilities.

NSTAR Electric believes this historical context is instructive in establishing the proper scope of Section 72 as it should be applied today. Given the advent of the Siting Board, for larger transmission lines, there is a significant overlap between the Siting Board's jurisdiction under G.L. c. 164, § 69J and the Department's authority under Section 72. That is, for new transmission lines one mile or longer and at a voltage of 69 kilovolts ("kV") or more on a new ROW, and for new transmission lines at a voltage of 115 kV or more on an existing ROW of 10 miles or more, concurrent jurisdiction exists between the Siting Board and the Department.⁴ G.L. c. 164, §§ 69G, 69H(2). The Siting Board's mandate expressly requires a finding of need, least cost and least environmental impact, with a full assessment of alternative routes and project alternatives. G.L. c. 164, § 69J. Section 72 does not impose similar requirements and does not contemplate as detailed a review.

⁴ To ensure that duplication and inefficiencies in the permitting of energy facilities do not result, the Legislature has authorized the Siting Board and Department to consolidate their reviews of such jurisdictional projects. G.L. c. 164, § 69H(2); G.L. c. 25, § 4.

For smaller transmission lines that are not subject to Siting Board review, while such lines may still be jurisdictional to the Department under Section 72, there is no statutory or public-policy reason to replicate a Siting Board proceeding under the guise of Section 72. The cost and lead time associated with obtaining regulatory and permitting approvals can be considerable. As the Department establishes guidelines for Section 72 reviews, it should strike an appropriate balance between: (a) ensuring that necessary facilities are installed to meet the needs of retail and wholesale customers in a reliable and timely manner; and (b) subjecting those facilities to an exhaustive review that may, in most instances, be duplicative with other permit approvals that must be secured. In the context of these smaller transmission lines, NSTAR Electric submits that the Department can discharge its obligation to make a finding of public convenience and necessity by ensuring that there is a legitimate need for constructing the transmission line, that the transmission line does not represent an unreasonable cost and that no other public interest concerns militate against the proposed transmission line. In those rare cases when eminent domain must be sought, these issues may need to be reviewed in more detail; however, in the more frequently occurring routine cases, given the presence of various other rate approval and environmental permitting reviews that are extant, an unreasonably burdensome evidentiary showing should not be required as part of the process of obtaining the Department's approval under Section 72.

A. The Nature of Transmission Lines Subject to Section 72.

As referenced above, Section 72 requires the Department to review "a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for

distribution and sale, or to a railroad, street railway or electric railroad, for purposes of operating it” With respect to this language, the Department seeks information in the following areas:

1. Does this language encompass all types of transmission lines that a transmission provider might construct, or are certain types of lines (for example, substation tap lines) excluded from this definition? Please explain.

The language in the statute is quite broad and would seem to encompass any and all lines that are used for the transmission of electricity. However, NSTAR Electric submits that, in practice, using such a broad interpretation would lead to an unreasonable result. The language of Section 72 requires approval for “a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for purposes of operating it....” G.L. c. 164, § 72 (emphasis added). Thus, the language of Section 72 requires approval of a transmission line for the purpose of operating that transmission line. Section 72 does not apply to substations, switching stations and other pieces of ancillary transmission equipment (including taps and tie-ins) that are incidental to transmission.⁵ Accordingly, the statutory language of Section 72 can be read properly to exclude such incidental transmission equipment.

Indeed, there are certain transmission line components that are de minimis in nature and should not be considered to be jurisdictional transmission lines under Section 72. For example, there are elements of transmission facilities that are incidental to

⁵ It is worth noting that, while such ancillary facilities can be jurisdictional to the Siting Board under Section 69J, there is no basis in Section 72 to infer such jurisdiction.

transmission lines and substations, including substation tap lines and ties-ins to switches, capacitor banks and other substation, switching station and transmission equipment. The purpose of these transmission elements is not to transport transmission service for any distance or over any area, but rather is to provide an interconnection with necessary equipment on the transmission network. Generally, these transmission elements are located entirely within existing substations, switching stations and ROWs. Moreover, these transmission elements are often short in length and do not implicate the types of issues that would be associated with a new transmission line in public ways or on ROWs. To require Section 72 approval for every substation tap line that is introduced would be inconsistent with Section 72 and would not further public convenience and necessity.

Therefore, NSTAR Electric does not believe the language of the statute is meant to encompass any and all lines that are used in any capacity for transmission. Notions of common sense and the goal of administrative efficiency dictate that transmission line components, such as taps and tie-ins, should not be considered transmission lines that require Section 72 approval.

2. Section 72 appears to distinguish between “a line for the transmission of electricity” and other electric lines. Are the Department’s two orders distinguishing transmission and distribution facilities in response to FERC Order 888 (Classification of Transmission and Distribution Facilities, D.T.E. 97-93 (1998), and Western Massachusetts Electric Company, D.T.E. 03-71 (2004)) relevant to the question of which electric lines are subject to Section 72? Can you propose a clear formula that would distinguish between transmission lines subject to Section 72 from distribution lines that would not be subject to Section 72?

NSTAR Electric believes that Section 72 contemplates Department review for transmission lines in broad terms, but not distribution lines more generally. The key question, then, is whether a given line represents transmission or distribution. Although

the two cases cited by the Department are useful in distinguishing transmission from distribution service for electric companies, it is unlikely that an industry-wide bright line test on this subject can be established. Because of the historical and geographical evolution of the electric system in the Commonwealth, there are wide disparities among electric companies as to what constitutes transmission or distribution. Nonetheless, factors such as the function of a line, its voltage, how it is accounted for, how it is treated for ratemaking purposes, and jurisdictional provisions of state and federal law are the best indicators of whether a line represents a transmission facility or a distribution facility.

Under Massachusetts law, a transmission line is defined in G.L. c. 164, § 1 as “the delivery of power over lines that operate at a voltage level typically equal to or greater than 69,000 volts...” (emphasis added). In the same statutory section, distribution is defined as “the delivery of electricity over lines which operate at a voltage level typically equal to or greater than 100 volts and less than 69,000 volts to an end-use customer within the [C]ommonwealth.” Thus, the statutory definitions are not definitive in categorizing transmission and distribution by voltage level alone. Also, in Classification of Transmission and Distribution Facilities, D.T.E. 97-93 (1998), the Department applied the seven-factor test used by the Federal Energy Regulatory Commission (“FERC”) in distinguishing between transmission and distribution facilities. This test considers a variety of functional factors such as proximity to retail customers, load flow and voltage, but does not set a bright-line test for distinguishing between distribution and transmission service. In Western Massachusetts Electric Company, D.T.E. 03-71, at 3 (2004) the Department accepted Western Massachusetts Electric Company’s (“WMECo”) bright-line standard for defining transmission to be 69 kV or above within its service territory.

However, this determination applies only to WMECo and cannot be expanded uniformly to utilities across the state. Accordingly, there is little or no statutory authority or regulatory precedent that would help to create a single, uniform state-wide standard for transmission service.

Indeed, even within NSTAR Electric, there are differences as to what voltage level represents transmission because of the historic evolution of the electric system in the Commonwealth. For example, 13.8 kV is considered a transmission voltage level within the City of Cambridge for the purposes of FERC-regulated tariffs, while in most other areas of the Company's service territory 115 kV represents the break point between transmission and distribution. Classification of Transmission and Distribution Facilities, D.T.E. 97-93, at 5, 9, 11-12 (1998). Although NSTAR Electric is working to create consistency across its service territory in this regard, and in the future expects to move toward uniformity at the 115 kV level, at present, this disparity currently exists.

Therefore, NSTAR Electric submits that a determination of transmission versus distribution status must be made on a case-by-case basis for each utility and for each project within a utility's service territory. Accordingly, consistent with the definitions of transmission and distribution in Chapter 164, FERC's seven-factor test remains the most appropriate method for distinguishing transmission and distribution facilities for purposes of Section 72.

3. From a policy perspective, are there voltage, length or other considerations that should dictate when a Section 72 filing is required? If so, please explain.

NSTAR Electric believes there are strong policy considerations for exempting certain minor and routine transmission projects from Section 72 review. NSTAR Electric and other transmission providers must have reasonable flexibility to operate and maintain

their transmission systems. Routine equipment additions, maintenance, repair and replacement that occur entirely within existing facilities, such as substations and switching stations, or within existing ROW, should not be subject to Section 72 review. These are also simple operations (such as reconductoring) that require no permits from any state or local agency, have no associated environmental impacts and involve no (or limited) crossings of public ways. NSTAR Electric has not sought approval for such routine activities in the past and to impose such a requirement at this time would introduce a substantial cost to the Company and its customers (see Section II.A.6, below). It would also generate significant delay in basic maintenance activities of the Company. A series of such delays could create reliability and operational difficulties across the NSTAR Electric system. Thus, public-policy concerns weigh in favor of exempting the installation, replacement or repair of small transmission line components from Section 72 review. This interpretation of Section 72 is also consistent with that of the Massachusetts Supreme Judicial Court (the “SJC”), which has construed Section 72 to govern new transmission lines or “substantially changed” lines. Boston Edison Co. v. Town of Sudbury, 356 Mass. 406, 416-17 (1969). NSTAR Electric does not believe that routine maintenance, as described above, represents a new or substantially changed line.

There are other types of ongoing utility maintenance of its system that should not be interpreted as giving rise to the level that warrants Department review. Specifically, the Department should consider de minimis changes, such as replacing a few defective poles when the replacement poles are virtually in the same location and of the same height, as not requiring Section 72 review. Such simple replacement of in-kind transmission poles or towers is a routine maintenance activity that does not justify

Section 72 review. The costs, delays and potential reliability concerns associated with a Section 72 review each time this type of activity must be undertaken would be contrary to the public interest.

Similarly, there can be instances in which a customer requests that the Company move the location of transmission facilities on the customer's land and at the customer's cost. In such instances, the public-policy concerns that underlie Section 72, i.e., need, cost and impacts on others, are not implicated. Accordingly, the public convenience and necessity interests would not be advanced by subjecting these types of small transmission facility changes to a Section 72 review.

As these examples illustrate, absolute standards for determining whether a project is significant enough to warrant Section 72 approval are impractical to devise because each instance is largely fact-specific. For example, even though NSTAR Electric proposes that the routine replacement of transmission poles not require Section 72 review as "altered construction," if several miles of poles were being replaced, or if the poles were of a substantially different height, Section 72 approval might be appropriate. If the Company sought to remove a series of particular transmission towers that were aging, the Company would have to replace them with new towers that are currently available and meet all electrical and other code requirements. These new replacement towers may be made of a different material, may be a different size, or may have a different appearance. NSTAR Electric recommends that, if the Department wants to adopt thresholds in these contexts, it should consider thresholds such as voltage increases of more than 20 percent, pole relocations of more than 100 feet (or outside existing ROWs), a pole relocation project of over a mile in length, and increases in pole heights of more than 20 feet as

potential triggers for an approval based on a “substantial change.” Changes below these parameters would be considered presumptively insufficient to warrant a new Section 72 review.⁶

Based upon the above, NSTAR Electric believes that public policy weighs in favor of an outright exemption for minor transmission components such as tap lines and tie-ins. With regard to changes to existing transmission facilities or routine maintenance, the Company proposes that the Department adopt a “substantially changed” standard in accordance with the SJC’s precedent. Although application of this standard may require some case-by-case determinations, transmission providers would be able to identify certain activities as not meeting the substantially changed standard (i.e., replacing one or two poles with an in-kind replacement). For areas where there is any lingering uncertainty, the Company could present the specific facts of the situation to the Department and consult the Department, as necessary.

4. Could the Department exempt certain types or lengths of electric transmission lines from Section 72 review, while retaining the ability to authorize the taking of property by eminent domain for a certain line of that type or length, if necessary? If so, please explain.

Based upon case law, there is a two-step process that is necessary to obtain the rights of eminent domain under Section 72. See Boston Edison Co. v. Town of Sudbury, 356 Mass. 406 (1969); Town of Sudbury v. Department of Pub. Utils., 351 Mass. 214 (1966); Town of Sudbury v. Department of Pub. Utils., 343 Mass. 428 (1962). First, there must be a determination of the transmission line satisfying the public convenience and necessity; second, a separate petition must be approved by the Department

⁶ Such presumptions may be overcome if there is some unique factor regarding the project that makes Section 72 review appropriate under the circumstances.

concluding that a grant of eminent domain is appropriate for the approved transmission line. Id. NSTAR Electric thus believes that Section 72 approval of a transmission line is a prerequisite to the Department's grant of eminent domain. In that regard, the Department's Section 72 eminent domain authority is extraordinarily valuable in that, in certain instances, it could be the only course of action for a utility to secure property rights for a needed transmission line. Accordingly, NSTAR Electric would have grave concerns about any action that would limit or remove the Department's eminent domain authority.⁷

5(A). For transmission providers: What factors do you consider when deciding whether to seek Section 72 approval for a new transmission line? Why do you consider these factors? Have these factors changed over time, or have you historically relied on these factors in deciding whether to seek Section 72 approval of new transmission projects?

NSTAR Electric has generally sought Section 72 approval for all new transmission lines regardless of location (i.e., new versus existing corridor). At present, NSTAR Electric has two Section 72 cases pending before the Department: its proposed 18-mile, 345 kV transmission line from Stoughton to Boston in a new transmission corridor (EFSB 04-1/D.T.E. 04-5/D.T.E. 04-7), and its three-mile transmission line through Framingham, Natick and Sherborn in an existing corridor (D.T.E. 04-71). Also, NSTAR Electric is currently preparing a filing for a new transmission line that is less than 4,000 feet in length within an existing transmission corridor. Thus, the Company treats all new transmission lines as requiring Department approval, whether they are in

⁷ Those transmission activities that NSTAR Electric has argued should be exempt from Section 72 review (taps, tie-ins, etc.) should not require the acquisition of property rights in that such activities would be most often located wholly within the Company's existing substations, switching stations and ROWs.

new corridors within urban streets or existing transmission ROWs. In addition, the Company has typically filed for Section 72 approval for transmission lines that are over one mile in length.

Although the factors considered by the Company with regard to Section 72 petitions have not changed over time, the Company's uncertainty in Section 72 application to transmission projects has increased. As a result, the potential for inconsistent application of Section 72 to a variety of projects has increased and the Company has, of necessity, become increasingly conservative in its application of Section 72.

5(B). For transmission providers: What voltage levels are used in your service territory: (a) for the transmission of electricity for distribution in some definite area; (b) for supplying electricity to yourself or to another electric company or to a municipal lighting plant for distribution and sale; and (c) for transmission of electricity to a railroad, street railway or electric railroad, for the purpose of operating it? Are there instances in which any of the same voltage levels also are used for lines in your service territory that are clearly distribution circuits only?

The Company utilizes a variety of operating voltages for both transmission and distribution purposes ranging from 120 volts up to 345,000 volts. The one clear demarcation point is at the 115 kV voltage level. NSTAR Electric serves Amtrak and the Massachusetts Bay Transportation Authority as wholesale transmission customers with 115 kV transmission facilities. In all cases, facilities operating at 115 kV or higher are expressly used for transmission and are not used for distribution. This is consistent among all utilities within the Commonwealth. As noted above, the unique characteristic for facilities operating at these voltage levels is the type of construction employed. Such lines, when constructed overhead, are almost exclusively located on rights-of-way and

generally do not provide service directly to customers. When such lines are constructed underground, they employ public streets and do not provide service directly to customers.

6. For transmission providers with recent experience in Section 72 reviews: Please provide an estimate of the incremental expenses incurred when a transmission project requires Section 72 review.

An uncontested Section 72 proceeding before the Department, as well as other related permitting agencies, could cost on the order of \$250,000, total (including legal fees, consultants and internal NSTAR Electric costs). However, a contested Section 72 proceeding, especially if eminent domain is required, could have total costs in excess of \$500,000. As an example, year-to-date expenditures for the Company's uncontested Framingham line, including the Section 72 proceeding (D.T.E. 04-71), are on the order of \$125,000. This cost includes preparation of the petition, environmental and legal analyses and the public comment hearing. The Department discovery, hearings and briefing expected in 2005 are estimated to be at least another \$45,000. Moreover, these figures may not capture all internal costs for employees at NSTAR Electric whose responsibilities are divided across several areas. Approximately one-third of the overall cost of permitting a project can be attributed to Department proceedings associated with a Section 72 case, with the balance relating to other permitting efforts. Therefore, the Company expects that roughly \$85,000 of the cost of the Framingham case will be associated with the Department's Section 72 petition.

B. Transmission Lines with Altered Construction.

Section 72 also states that "[a]ny electric company, distribution company, generation company, or transmission company or any other entity providing or seeking to provide transmission service may petition the [D]epartment for authority to ... continue to use as constructed or with altered construction a line for the transmission of

electricity.” With respect to this language, the Department seeks information in the following areas:

1. Should this language be read as requiring companies to seek Section 72 approval for alterations to certain transmission lines, where eminent domain is not required for such alterations? If so, what types of alterations might require Section 72 approval, and what types should be considered routine maintenance, not requiring such approval?

First, with regard to the language “continue to use as constructed,” NSTAR Electric believes that this language is meant to provide an avenue to seek eminent domain over land where an existing transmission line is located in the event that an abutter or other landowner raises concerns with respect to the company’s rights to the land after the facility has been constructed. That is, even for transmission lines that presently exist, Department authority exists to grant eminent domain to use that transmission line as originally constructed or with changed construction if for some reason a property-right dispute arises for which eminent domain rights must be granted. NSTAR Electric believes that this is a valuable provision, particularly with respect to older facilities that were constructed decades ago. With the increasing density of residential and commercial development, as well as scarce availability of vacant real estate, the potential for such disputes may increase over time and this language in Section 72 allows the Department to exercise jurisdiction in such instances.

With respect to the Department’s question regarding the “altered construction” of a line and whether Section 72 approval is required for such alteration if eminent domain authority is not sought, the Company believes that case law on this point is well-settled. If a facility is subject to Section 72, whether as a new transmission line or as a line with substantially changed construction, Section 72 approval is required regardless of whether

eminent domain is required. See Boston Edison Co. v. Town of Sudbury, 356 Mass. 406 (1969); Town of Sudbury v. Department of Pub. Utils., 351 Mass. 214 (1966); Town of Sudbury v. Department of Pub. Utils., 343 Mass. 428 (1962).

However, as described above, for “altered construction” to require Section 72 approval, the transmission line must meet a “substantial change” test. As such, routine maintenance and servicing of the transmission system should not be considered “altered construction” for purposes of Section 72. Moreover, these kinds of activities should not require eminent domain authority because they occur within existing substations, switchyards and ROWs, where the Company already has necessary land rights. Instead, as discussed above, NSTAR Electric would consider a “substantial change” that would qualify as “altered construction” to be significant changes to the height, location, voltage of an existing line or if such alterations occur over a large area.

2. For transmission providers: Have you ever sought Section 72 approval for alterations to an existing transmission line, except in the context of an eminent domain filing? If so, please provide recent examples. What factors do you consider when deciding whether to seek such approval? Why do you consider these factors? Are there other factors you think should be considered, going forward?

NSTAR Electric has not encountered circumstances necessitating Section 72 approval for alterations to any existing transmission line. In a few instances, however, NSTAR Electric has had projects with uncertainty in this area and it has presented those situations to the Department to confirm that Section 72 review was not needed.

3. For transmission providers: Approximately how many additional Section 72 filings would you make annually if Section 72 approval were required for all reconductoring of electric transmission lines? For reconductoring that required replacement or replication of all poles? For the relocation of a transmission line outside of the existing right-of-way?

“Reconductoring” is the replacement of conductors (i.e., cables) and supporting hardware (but excluding poles or towers) with like or greater capacity (but not higher voltage), regardless of distance. The Company estimates that a new reconductoring project may be needed every one to three years. It is important to note that reconductoring is generally a two-step process. The first step involves the removal of the old cable, while the second step requires the installation of the new cable. NSTAR Electric does not believe that reconductoring projects should be subject to Section 72 approval because they are simply a maintenance activity that does not result in any change in voltage or any other substantial change in the transmission lines.

C. Scope of Section 72 Proceeding.

1. Attached to this Request for Comments is a draft checklist, similar to the checklist used for zoning exemptions, which outlines the information that should be submitted as part of a Section 72 filing. Does the checklist accurately convey the scope of current Department proceedings with respect to Section 72 reviews? If not, what should be changed to accurately convey that scope? Would you recommend any changed to the current scope of the Section 72 review?

The draft checklist proposed by the Department for use in Section 72 proceedings accurately conveys the nature and scope of such cases. In most respects, the checklist is consistent with the checklist that has been developed relative to cases brought under G.L. c. 40A, § 3 for zoning exemptions. However, NSTAR Electric has concerns regarding the level of detail the Department intends to pursue on each of the topics on this checklist. For example, the checklist requires that a Section 72 petition contain: “[a]n

analysis of the environmental or other impacts of the transmission line, during both construction and operation. This analysis could include, without limitation, impacts on land use along or near the route, on water, wetlands and habitat resources along or near the route, visual and noise considerations, public safety considerations, or the use of hazardous substances.”

Technically, under Section 72, there is no express requirement for the Department to make specific findings on a full array of potential environmental impacts in the same manner as the Siting Board does pursuant to Section 69J. Instead, the Department’s review is statutorily defined as whether the facility “will serve the public convenience and is consistent with the public interest.” Although the “public interest” standard is broad and could include a review of environmental impacts when such matters are directly at issue, as discussed above, the Company does not believe that Section 72 reviews need to be the same in scope to those facilities subject to Siting Board review. The Siting Board has explicit jurisdictional authority to review a range of environmental impacts and petitions to the Siting Board make detailed and extensive presentations on environmental impacts. These in-depth analyses are costly and time-consuming and the Company would be hesitant to make such studies a fundamental part of a Section 72 petition where there are no obvious or significant environmental concerns.⁸

⁸ That is not to say that an analysis of a discrete set of environmental impacts may not be appropriate in a particular Section 72 case if there is a legitimate issue for a given project. NSTAR Electric is suggesting, however, that a comprehensive presentation and review of environmental impacts need not become a generic part of all Section 72 proceedings.

2. As discussed above, there have been difference of opinion in the past as to whether G.L. c. 164, § 72 requires that a company seek Department approval to construct any new transmission line, or whether the Department's approval is necessary only when an eminent domain taking is necessary for such construction. Given the court's holdings in Sudbury and BEC, and the amendments to G.L. c. 164, § 72 adopted as part of Chapter 249 of the Acts of 2004, is it still possible to argue that Department approval should be required only when an eminent domain taking is necessary for the construction of a transmission line? If so, please explain.

As discussed in Section A.4, above, there is a two-step process that is necessary to obtain the rights of eminent domain under Section 72. See Boston Edison Co. v. Town of Sudbury, 356 Mass. 406 (1969); Town of Sudbury v. Department of Pub. Utils., 351 Mass. 214 (1966); Town of Sudbury v. Department of Pub. Utils., 343 Mass. 428 (1962). First, there must be a determination of the transmission line satisfying the public convenience and necessity; second, a separate petition must be approved by the Department concluding that a grant of eminent domain is appropriate for the approved transmission line. Id. Accordingly, NSTAR Electric believes that Section 72 approval of a transmission line is a prerequisite to the Department's grant of eminent domain.

III. CONCLUSION

Given the recent increase in the number of Section 72 proceedings, the Company supports the Department's NOI and the consideration of a clearer set of standards for establishing when Section 72 approval is needed. The Company's overall objective is to ensure that it has the flexibility to maintain and, as needed, expand its transmission system while enabling the Department to carry out its statutory function under Section 72 in an efficient and appropriate manner. We believe that the recommendations set forth above achieve a proper balance between the policies underlying Section 72 and the Company's obligation to provide safe, reliable and cost-effective service to customers.

We appreciate the opportunity to submit these comments and look forward to participating in technical conferences or any other further procedures the Department may initiate.